Perwira Affin Merchant Bank Bhd v Dato' Soh Chee Wen

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3-22-1008 OF 1998
ABDUL WAHAB J
21 DECEMBER 1999

Civil Procedure *— Summary judgment — Application for — Claim for professional fee and underwriting commission — Professional services rendered in acquisition of shares of company — Allegation that plaintiff failed to exercise reasonable care and skill in providing professional services — Underwriting agreement not intended by parties to create legal rights and obligations — Whether triable issues raised*

The plaintiff was a licensed merchant bank and was authorized to provide consultancy and advisory services relating to corporate and investment matters. On 21 July 1997, the defendant appointed the plaintiff in writing as adviser to the defendant for the purposes of an unconditional mandatory general offer to acquire the then anticipated remaining 21,447,597 ordinary shares of RM1 each representing approximately 7.89% of the then enlarged issued and paid-up share capital of Uniphoenix Corp Bhd ('UCB') ('the offer'), which appointment encompassed various advisory and other services, upon the terms and conditions set out in a letter dated 21 July 1997 from the plaintiff to the defendant which the defendant accepted in writing. It was a term of the plaintiff's appointment as adviser for the offer that the defendant was to pay to the plaintiff a professional fee of RM1,093,827 being 1% of the anticipated total general offer consideration for the offer. The parties also entered into an underwriting agreement whereby the defendant agreed to pay the plaintiff underwriting commission. The plaintiff applied for a summary judgment against the defendant under O 14 of the Rules of the High Court 1980. The application was rejected by the senior assistant registrar. The plaintiff appealed. The defendant argued that the plaintiff failed to exercise reasonable care and skill in providing the professional services, and failed to properly advise the defendant and/or make sufficient representations to the Securities Commission with regards to the decision of the Securities Commission requiring the defendant to obtain approvals from the Ministry of Finance for the purposes of the general offer. The defendant also contended that the underwriting agreement was a sham document which was not intended by the plaintiff or the defendant to create legal rights and obligations.

Held, allowing the appeal:

(1) The assertion that the plaintiff failed to take any or any adequate or effective measures to make representations to the Securities Commission that the approval of the Ministry of Finance was not required for the general offer, was purely argument and opinion. The defendant did not indicate how he would prove the assertion.

It was not disputed that the Ministry of Finance did give its approval. No such approval would have been issued if its approval was not required in the first place. It was clear then the approval of the Ministry was required. The first assertion is therefore clearly unsupportable (see p 571D–F). A

(2) For the second assertion that the plaintiff failed to take any or any adequate or effective steps to apply for a review of the decision of the Securities Commission that approval of the Ministry of Finance was required for the general offer, it was not shown that such an application was going to be decided upon any quicker than an application for approval by the Ministry of Finance or indeed if such an application was likely to be given. If not, it would have added more delay. The defendant had left these questions at large. The court should not and could not speculate, on the basis of the affidavits produced, how a trial might serve to resolve it. Nothing was produced to show that this question warranted a trial (see p 571F–G). B C D

(3) On the face of it the underwriting agreement was properly executed. The defendant admitted signing it. Nothing in the document showed that it was not intended to be a legally binding agreement. The defendant while asserting that the underwriting agreement was a sham failed to advance or point to any source of evidence to support his assertion that the agreement was a sham. Indeed no collateral arrangement was pleaded in the defence and counterclaim as would explain why the plaintiff would enter into a sham agreement. Upon the failure to plead it, the argument ought to be disregarded. Upon the failure of the defendant to point to any evidence or source of evidence of any such collateral agreement, no triable issue of a collateral contract can arise as would affect the underwriting agreement (see pp 572H, 573F-G). E F

(4) If the defendant had signed the agreement with the intention that it be a sham, he could not rely upon that unlawful and dishonest act for his benefit. It would be wholly contrary to public policy and public interest to accept that a duly executed agreement could be set aside by a party as a sham and upon the unilateral assertion that he intended it to be a sham. Considering the foregoing, the absence of any evidence that the inherently incredible assertions could be supported by evidence of documents or testimony of persons named by the defendant who could give evidence in support of such assertions, led the court to conclude these assertions sought to be raised as issues were not triable, and no real purpose would be achieved by holding a trial (see pp 573H–574A). G H

(5) The plaintiff had otherwise performed all of its advisory and underwriting obligations. The arguments of the underwriting agreement lacking consideration and not intended to be binding, and of the advisory services not being performed with the requisite I

A care and skill being plainly unsustainable, the appeal was allowed with costs and judgment was entered in terms of the O 14 application (see p 575A).

B **[Bahasa Malaysia summary**

Plaintif adalah sebuah bank saudagar berlesen dan mempunyai kuasa untuk memberikan khidmat nasihat dan pakar runding berhubung dengan hal-hal pelaburan. Pada 21 Julai 1997, defendan telah secara bertulis melantik plaintif sebagai penasihat kepada defendan dalam hal tawaran am mandatori tanpa syarat untuk membeli baki saham C biasa yang dijangkakan pada waktu itu sebanyak 21,447,597 dengan harga RM1 setiap satu yang pada ketika itu juga mewakili lebih kurang 7.89% daripada modal terbitan dan berbayar syarikat Uniphoenix Corp Bhd ('UCB') ('tawaran tersebut'). Perlantikan tersebut merangkumi berbagai khidmat nasihat dan lain-lain perkhidmatan, yang tertakluk pada terma-terma dan syarat-syarat yang terkandung di D dalam surat plaintif kepada defendan bertarikh 21 Julai 1997 yang telah dipersetujui oleh defendan secara bertulis. Perlantikan plaintif sebagai penasihat dalam tawaran itu mengandungi terma bahawa defendan perlu membayar kepada plaintif yuran profesional sebanyak RM1,093,827 yang merupakan 1% daripada jumlah balasan tawaran E am yang dijangkakan tersebut. Kedua-dua pihak juga telah mengikat sebuah perjanjian menaja jamin di mana defendan bersetuju untuk membayar plaintif komisyen menaja jamin. Plaintif memohon penghakiman terus terhadap defendan di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Permohonan tersebut telah ditolak oleh penolong kanan pendaftar. Plaintif merayu terhadap keputusan F tersebut. Defendan berhujah bahawa plaintif telah gagal melaksanakan kewajiban berhati-hati dan kemahiran yang berpatutan di dalam memberikan khidmat profesional tersebut, dan telah gagal menasihati defendan dengan sewajarnya dan/atau membuat pernyataan yang secukupnya kepada Suruhanjaya Sekuriti berhubung dengan keputusan Suruhanjaya Sekuriti yang memerlukan defendan G supaya mendapatkan kelulusan Kementerian Kewangan untuk tawaran am tersebut. Defendan juga mendakwa bahawa perjanjian menaja jamin tersebut adalah suatu dokumen palsu yang tidak pernah dimaksudkan oleh plaintif atau defendan untuk mengwujudkan obligasi dan hak di sisi undang-undang.

H **Diputuskan**, membenarkan rayuan tersebut:

(1) Penegasan bahawa plaintif telah gagal untuk mengambil apa-apa langkah atau langkah-langkah yang wajar atau berkesan untuk membuat pernyataan kepada Suruhanjaya Sekuriti bahawa kelulusan Kementerian Kewangan tidak diperlukan bagi I tujuan tawaran am, adalah suatu pendapat dan hujahan semata-mata. Defendan tidak menunjukkan bagaimana beliau boleh membuktikan penegasan itu. Hakikat bahawa Kementerian

Kewangan telah benar-benar memberikan kelulusannya tidak dipertikaikan. Kelulusan tidak mungkin akan diberikan sekiranya ia memang tidak langsung diperlukan. Maka adalah jelas bahawa kelulusan Kementerian memang diperlukan. Oleh itu jelas tiada sokongan atas penegasan pertama (lihat ms 571D–F).

(2) Bagi penegasan kedua bahawa plaintif telah gagal untuk mengambil apa-apa langkah atau langkah-langkah yang wajar atau berkesan untuk memohon supaya keputusan Suruhanjaya Sekuriti yang memutuskan bahawa kelulusan Kementerian Kewangan perlu diperolehi untuk tujuan tawaran am tersebut dikaji semula, tiada sebarang keterangan yang menunjukkan bahawa permohonan sedemikian akan diputuskan lebih cepat daripada permohonan untuk mendapatkan kelulusan Kementerian Kewangan ataupun bahawa permohonan sedemikian sememangnya berkemungkinan besar akan dibenarkan. Sekiranya tidak, maka akan bertambah lagi tempoh kelewatan. Persoalan ini telah dibiarkan terbuka oleh defendan. Mahkamah tidak harus dan tidak boleh membuat spekulasi tentang cara mana perbicaraan boleh dapat menyelesaikannya atas dasar afidavit yang dikemukakan. Tiada sebarang keterangan dikemukakan untuk menunjukkan bahawa persoalan ini mewajarkan suatu perbicaraan diadakan (lihat ms 571F-G).

(3) Pada zahirnya perjanjian menaja jamin telah ditandatangani dengan sempurna. Defendan mengakui menandatanganinya. Isi kandungan dokumen tersebut tidak menggambarkan bahawa ia tidak dimaksudkan sebagai satu perjanjian yang mengikat di sisi undang-undang. Walaupun defendan menegaskan bahawa perjanjian menaja jamin tersebut adalah palsu, defendan telah gagal untuk mengemukakan ataupun merujuk pada sumber maklumat bagi menyokong penegasannya bahawa perjanjian tersebut adalah palsu. Bahkan tiada perjanjian kolateral yang diplidkan di dalam pembelaan dan tuntutan balas yang dapat menjelaskan mengapa plaintif bersedia mengikat perjanjian palsu. Di atas kegagalan untuk memplidkan sedemikian, penghujahan tersebut tidak harus diendahkan. Di atas kegagalan defendan merujuk pada apa-apa keterangan atau sumber maklumat berkenaan perjanjian kolateral, maka tidak timbul isu kontrak kolateral yang boleh dibicarakan yang boleh menjejaskan perjanjian menaja jamin (lihat ms 572H, 573F–G).

(4) Sekiranya defendan menandatangani perjanjian tersebut dengan meniatkannya sebagai palsu, defendan tidak boleh bergantung atas tindakannya yang menyalahi undang-undang dan tidak jujur tersebut untuk kepentingan dirinya. Penerimaan pandangan bahawa sebuah perjanjian yang telah ditandatangani boleh diketepikan oleh mana-mana pihak atas dasar ia adalah palsu dan juga atas penegasan oleh sebelah pihak bahawa dia meniatkannya sebagai palsu adalah bercanggah sama sekali dengan polisi awam

dan kepentingan awam. Memandangkan keadaan yang disedemikian, ketiadaan sebarang keterangan bahawa penegasan tidak boleh dipercayai boleh disokong oleh keterangan dokumen atau testimoni mana-mana orang yang dipilih oleh defendan yang mampu memberikan keterangan bagi menyokong penegasan tersebut, mendorong mahkamah untuk memutuskan bahawa penegasan yang cuba dibangkitkan sebagai isu adalah bukan merupakan isu yang boleh dibicarakan, dan tiada sebarang matlamat sebenar dapat dicapai daripada mengadakan perbicaraan (lihat ms 573H–574A).

(5) Plaintif sebaliknya telah menyempurnakan segala obligasinya menasihati dan menaja jamin. Penghujahan bahawa perjanjian menaja jamin tidak mempunyai apa-apa balasan dan tidak bermaksud untuk mengikat, dan perkhidmatan nasihat tidak dilaksanakan dengan berhati-hati dan dengan kemahiran yang diperlukan nyata tidak boleh diterima. Maka rayuan dibenarkan dengan kos dan penghakiman di bawah A 14 dicatatkan (lihat ms 575A).

Notes

For cases on application for summary judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4436–4446.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Cow v Casey [1949] 1 All ER 197 (refd)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (refd)

European Asian Bank AG v Punjab & Sind Bank [1983] 2 All ER 508 (refd)

Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd [1992] 2 MLJ 137 (refd)

Faber Merlin (M) Sdn Bhd v Lye Thai Sang [1985] 2 MLJ 380 (refd)

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin Ors [1995] 2 MLJ 213 (refd)

Kapital Raya Sdn Bhd v Bloomville Corp Sdn Bhd [1996] 3 MLJ 522 (refd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)

Ng Ah Ba & Ors v Ramanda Sdn Bhd [1996] 1 MLJ 62 (refd)

United Malayan Banking Corp v Datin Theresah bte Abdullah [1995] 1 AMR 304 (refd)

United Malayan Banking Corp v Palm & Vegetable Oils (M) Sdn Bhd [1983] 1 MLJ 206 (refd)

Legislation referred to

Rules of the High Court 1980 O 14
Securities Commission Act 1993 ss 10, 32B
Securities Industry Act 1983 s 86
Take-overs and Mergers Code 1987 r 34.1(a)

RS Nathan (*KS Mogan* with him) (*Shearn Delamore & Co*) for the plaintiff.

Krishna Kumar (*Tharamjit Singh* with him) *Krish Maniam & Co*) for the defendant.

Cur Adv Vult

Abdul Wahab J:

This appeal

The appellant/plaintiff (plaintiff) Perwira Affin Merchant Bank Berhad is a company incorporated in Malaysia with its registered address at 27th Floor, Wisma Boustead, 69 Jalan Raja Chulan, 50200 Kuala Lumpur, and is a licensed merchant bank within the meaning of the Banking and Financial Institutions Act 1989 and is authorised thereunder, inter alia, to provide consultancy and advisory services relating to corporate and investment matters.

The respondent/defendant (defendant) Dato' Soh Chee Wen is a businessman at Lot 3606 Jalan 5512/1, Subang Jaya, 47500 Petaling Jaya and, alternatively, at c/o Kelanamas Industries Berhad, 9th Floor, Plaza Kelanamas, 19 Lorong Dungun, Damansara Heights, 50490 Kuala Lumpur.

The plaintiff is appealing against the rejection by the senior assistant registrar of its application ('encl 6') to enter summary judgment under O 14 of the Rules of the High Court 1980:

(1) Bahawa plaintiff diberi kebenaran untuk memasukkan penghakiman terus terhadap defendan menurut Aturan 14 Kaedah-kaedah Mahkamah Tinggi 1980 bagi jumlah-jumlah yang berikut:

(i) RM560,586.34 bersama dengan faedah dari 29 September 1997 sehingga tarikh penghakiman pada kadar sewajar yang Mahkamah yang Mulia ini fikirkan sesuai selaras dengan Akta Undang-Undang Sivil 1956.

(ii) RM560,586.34 bersama dengan faedah dari 1 Februari 1998 sehingga tarikh penghakiman pada kadar sewajar yang Mahkamah yang Mulia ini fikirkan sesuai selaras dengan Akta Undang-Undang Sivil 1956.

(iii) RM1,076,657.27 bersama dengan faedah dan 8 Januari 1998 sehingga tarikh penghakiman pada kadar sewajar yang Mahkamah yang Mulia ini fikirkan sesuai selaras dengan Akta Undang-Undang Sivil 1956.

(iv) RM5,705.55 bersama dengan faedah dari 20 Mac 1998 sehingga tarikh penghakiman pada kadar sewajar yang Mahkamah yang Mulia ini fikirkan sesuai selaras dengan Akta Undang-Undang Sivil 1956.

A (2) bersama dengan faedah atas 1(i), 1(ii), 1(iii) dan i(iv) di atas pada kadar 8% setahun dan tarikh penghakiman sehingga penyelesaian penuh.

(3) Kos permohonan ini ditanggung oleh defendan.

The issues in this case are best identified by first proceeding to the pleadings.

B

Pleadings: The plaintiff's claim

On or about 21 July 1997, the defendant appointed the plaintiff in writing as adviser to the defendant for the purposes of an unconditional mandatory general offer to acquire the then anticipated remaining 21,447,597 ordinary C shares of RM1 each representing approximately 7.89% of the then enlarged issued and paid-up share capital of Uniphoenix Corp Bhd ('UCB') not already held by the defendant and parties acting in concert with him at a then anticipated offer price of RM1 per share to be implemented in accordance with the provisions at the Malaysian Code on Takeovers and Mergers ('the Code') (collectively referred to as 'the offer'), which D appointment encompassed various advisory and other services, particulars of which are set out below and in any event known to the defendant, upon the terms and conditions set out in a letter dated 21 July 1997 from the plaintiff to the defendant which the defendant accepted in writing ('the letter of appointment') for the following:

E (i) Evaluate and advise on the terms and structure of the Offer including compliance with the Code and the relevant provisions of the Securities Commission Act 1993 and thereupon make a recommendation accordingly;

(ii) Preparing and serving the notice of mandatory general offer to the Board of Directors of UCB;

F (iii) Preparing the offer document and submitting it to the Securities Commission ('SC') for clearance;

(iv) Arranging for the printing and subsequent dispatch of the offer document to the minority shareholders of UCB;

(v) Preparing and submitting application to the foreign investment G committee ('FIC') for the acquisition of what was then approximately 73.52% equity interest in UCB ('Shares Acquisition') as well as the resulting equity structure in UCB arising from the Offer;

(vi) Drafting and releasing public announcements pertaining to the offer and level of acceptances for the Offer;

(vii) Attend to possible queries from the shareholders of UCB on the Offer;

H (viii) Liaising with the independent adviser to the minority shareholders for the subsequent issue of the independent advice circular; and

(ix) Generally coordinate with the officials of UCB, the SC, the FIC and other professionals (where required) on matters pertaining to the Offer.

I It was a term of the plaintiff's appointment as adviser for the Offer that the defendant was to pay to the plaintiff a professional fee of RM1,093,827 being 1% of the anticipated total general offer consideration for the offer of

RM109,382,745 ('the fee'), with 50% of the fee being subject to service tax of 5%. The fee excludes all recoverable disbursements, printing and advertisement expenses, professional fees charged by other professionals such as the solicitors, processing fees charged by the relevant authorities, and service tax as well as underwriting commission in connection with the shares to be underwritten pursuant to the offer.

It was also a term of the plaintiff's appointment as adviser to the defendant for the offer that the plaintiff was to provide financial resources to the defendant to enable the defendant to implement the offer. Pursuant to the obligation to provide financial resources to the defendant, the plaintiff was to underwrite the entire amount of the UCB shares which were the subject of the offer ('the offer shares') excluding those UCB shares which were the subject of undertakings by holder of those shares not to accept the offer. The plaintiff was to be paid an underwriting commission ('the underwriting commission') of 1% of the total overall general offer price for the offer shares.

The plaintiff averred that by an underwriting agreement in writing dated 25 July 1997 ('the underwriting agreement') entered into between the plaintiff of the first part and the defendant of the other part, the plaintiff agreed to underwrite the offer shares, which, on the assumption that all holders of UCS Transferable Subscription Rights ('TSRs') and UCB irredeemable convertible unsecured loan stocks ('ICULS') had converted their TSRs and ICULS before the date for acceptance of the offer, would eventually comprise 21,447,356 UCB shares at a final price of RM5.02 per share.

In consideration of the plaintiff underwriting the offer shares, the defendant agreed to pay the plaintiff underwriting commission, payable seven days after the 'payment date' which was defined in the underwriting agreement as 21 days after the 'closing date', which in turn was defined in the underwriting agreement as the date upon which the offer shall close.

Pursuant to cl 7 of the underwriting agreement, the defendant agreed to bear all costs, charges and expenses of and incidental to the offer, and all costs, charges and expenses of and incidental to the preparation of the underwriting agreement and costs and charges incurred in connection with the transfer and registration of any accepted shares which were the subject of the plaintiff's underwriting obligations in favour of the plaintiff qua underwriter or its nominees and such other fees as may be imposed by the Rules of the central depository.

The plaintiff averred that having duly performed its obligations pursuant to the underwriting agreement and duly carried out its obligations as adviser to the offer the plaintiff accordingly invoiced the defendant for the fee payable for services duly rendered pursuant to the letter of appointment, particulars of which are set out below but which in any event were within the knowledge of the defendant, which the defendant failed to pay. The underwriting commission became due and payable on 2 January 1998. In breach of his express contractual obligations under the underwriting

A agreement, the defendant defaulted in payment of the underwriting commission in the amount of RM1,076,657.27 on or by 2 January 1998.

The plaintiff through its solicitors, Messrs Shearn Delamore & Co issued a letter of demand dated 12 March 1998 to the defendant for the payment of the fee and the underwriting commission as well as certain B miscellaneous sums totalling RM5,705.55. Despite the letter of demand, the defendant failed, neglected, refused and/or omitted to pay the sums stated.

The plaintiff therefore claimed against the defendant:

(1) the sum of RM560,586.34 and RM560,586.34;

C (2) the sum of RM1,076,657.27;

(3) the sum of RM5,705.55;

(4) interest on (1), (2) and (3) from the respective dates below to date of judgment at such rate as this honourable court may deem fit pursuant to the Civil Law Act 1956:

D RM560,586.34

RM560,586.34

RM1,076,657.27

RM5,705.55

E from 29 September 1997 from 1 February 1998 from 3 Janaury 1998 from 20 March 1998

(5) interest on (1), (2) and (3) at the rate of 8% pa from date of judgment to the date of full realization.

(6) costs;

F (7) such further or other relief as this honourable court may deem just and appropriate.

Pleadings: The defence and counterclaim

G The defendant contended that it was a term of the agreement dated 21 July 1997 ('the advisory agreement') or alternatively it was the duty of the plaintiff to exercise all reasonable care and skill as professional financial advisors for the unconditional mandatory general offer to acquire the then anticipated remaining 21,447,597 ordinary shares of RM1 each ('the general offer') of Uniphoenix Corp Bhd ('UCB') and accordingly, the H plaintiff ought properly to have exercised all reasonable care and skill in the conduct of its obligations pursuant to the advisory agreement as set out in para 4 of the statement of claim ('the professional services').

It was averred the plaintiff was at all material times aware that the defendant required the professional services of the plaintiff for advising and implementing the general offer and that the plaintiff was aware at all I material times that the defendant intended to and did rely on the professional services for the purposes of the general offer and in or about August 1997, in pursuance of its obligations under the advisory agreement,

the plaintiff proceeded to liaise with the Securities Commission and the Foreign Investment Committee with regards to the terms and implementation of the general offer ('the consultations'). Between August 1997 and September 1997, in the course of the consultations, the plaintiff informed the defendant that the Securities Commission required the approval of the Ministry of Finance for his acquisition of the anticipated 196,567,661 ordinary shares of RM1 each of UCB; acquisition of 1,548,000 transferable subscription rights in UCB; and acquisition of RM31,000 nominal value of the irredeemable convertible unsecured loan stocks in UCB (collectively 'the acquisition').

It was argued that by reason of the negligence and in breach of the advisory agreement, and of the terms thereof, on the part of the plaintiff, their servants or agents, the plaintiff failed to properly advise the defendant and/or make sufficient representations to the Securities Commission with regards to the decision of the Securities Commission requiring the defendant to obtain approvals from the Ministry of Finance for the purposes of the general offer. The particulars advanced are as follows:

(a) Failing to take any or any adequate or effective measures to make representations to the Securities Commission that the approval of the Ministry of Finance was not required for the general offer, at the request of the defendant;

(b) Failing to take any or any adequate or effective steps to apply for a review of the decision of the Securities Commission that approval of the Ministry of Finance was required for the general offer;

(c) Failing to advise or properly advise the defendant that representations could be made and a review could be sought with regards to the decision; and

(d) In the premises, failing to exercise reasonable care and skill in providing the professional services.

The defendant argued that in consequence of and relying on the advice of the plaintiff, the dispatch of the offer document prepared by the plaintiff for the general offer, to the members of UCB was delayed by approximately two months, that is from 17 September 1997 (when the Foreign Investment Committee approved the acquisition) until 13 November 1997 (when the Ministry of Finance approved the acquisition). The result of the requirement for approval by the Ministry of Finance for the acquisition was that the period between the notice of takeover on 28 July 1997 and the close of the general offer on 5 December 1997 was approximately six months, and by reason of the delay in the dispatch of the offer document and thus the close of the general offer, the defendant has suffered loss and damage. Thus, it was argued, by reason of the plaintiffs negligence and/or breach of the advisory agreement, the defendant is not liable to the plaintiff in the sum of RM1,093,827 ('the fee') or at all.

It was admitted that it was a term of the plaintiff's appointment as adviser to the defendant for the offer that the plaintiff was to provide financial resources to the defendant to enable the defendant to implement

A the offer; and pursuant to the obligation to provide financial resources to the defendant as aforesaid, the plaintiff was to underwrite the entire amount of the UCB shares which were the subject of the offer ('the offer shares') excluding those UCB shares which were the subject of undertakings by holder of those shares not to accept the offer. The defendant qualified this to say that it was a term of the advisory agreement that the defendant was
B required to appoint the plaintiff to underwrite the entire amount of UCB shares which were the subject of the general offer shares ('the offer'), excluding the UCB shares which were subject of the undertakings not to accept the general offer.

Admitting only that the plaintiff and the defendant executed an
C underwriting agreement, and calling it the purported underwriting agreement, the defendant denied:

(a) agreeing that the plaintiff was to be paid an underwriting commission ('the underwriting commission') of 1% of the total overall offer price for the offer shares; or

D (b) that by an underwriting agreement in writing dated 25 July 1997 ('the underwriting agreement') entered into between the plaintiff of the first part and the defendant of the other part, the plaintiff agreed to underwrite the offer shares, which, on the assumption that all holders of UCS Transferable Subscription Rights ('TSRs') and UCB irredeemable convertible unsecured loan stocks ('ICULS') had
E converted their TSRs and ICULS before the date for acceptance of the Offer, would eventually comprise 21,447,356 UCB shares at a final price of RM5.02 per share, or

(c) that in consideration of the plaintiff underwriting the offer shares as aforesaid, the defendant agreed to pay the plaintiff underwriting
F commission (as defined above), payable seven days after the 'payment date' which was defined in the underwriting agreement as 21 days after the 'Closing Date', which in turn was defined in the underwriting agreement as the date upon which the offer shall close.

It was also denied that pursuant to cl 7 of the underwriting agreement, the
G defendant agreed to bear all costs, charges and expenses of and incidental to the offer, and all costs, charges and expenses of and incidental to the preparation of the underwriting agreement and costs and charges incurred in connection with the transfer and registration of any accepted shares which were the subject of the plaintiff's underwriting obligations in favour of the plaintiff qua underwriter or its nominees and such other fees as may
H be imposed by the rules of the central depository.

The defendant contended that the underwriting agreement is a sham document, which was not intended by the plaintiff or the defendant to create legal rights and obligations. In so doing, the defendant relied on the following.

I The defendant asserted that in or about July 1997, the plaintiff through its officers, servants and/or agents requested that the defendant procure a put option ('the put option') from three stockbrokers, namely MGI

Securities Sdn Bhd, MBf Northern Securities Sdn Bhd, and Alor Setar Securities Sdn Bhd ('the brokers'); and accordingly, on or about 25 July 1997, the defendant procured the put option from the brokers in favour of the plaintiff by way of a written agreement dated 25 July 1997 ('the put option agreement'). The salient terms of the put option agreement included the obligation of the brokers to purchase the offer shares upon the exercise of the put option by the plaintiff. The defendant averred he will rely on all the terms of the put option agreement at the trial of this action; and accordingly, the defendant will contend that any and all obligations of the plaintiff pursuant to the underwriting agreement were in fact illusory in that any and all such obligations were obligations of the brokers pursuant to the put option agreement. Thus it was argued that by reason of the above, that it was never the intention of the plaintiff or the defendant to create any legal rights by the execution of the underwriting agreement.

The defendant further contended that by reason of the execution of the put option agreement, there was no consideration or no valid consideration between the plaintiff and the defendant with regard to the underwriting agreement and accordingly, para 12 of the statement of claim was denied and the defendant contended that by the reason of the matters above stated, the defendant was not liable for the sum of RM1,076,657.27 and the sum of RM5,705.55 or at all.

Although the plaintiff invoiced the defendant, and that the plaintiff through its solicitors, issued a letter dated 12 March 1998, the defendant averred that by reason of the matters above-stated, the defendant was not liable to the plaintiff in the sums claimed or at all.

The defendant by way of counterclaim claimed:

(1) Damages to be assessed.

(2) Interest thereon at 8% pa from date of judgment to date of realisation.

(3) Costs.

(4) Such further or other relief as this honourable court deems just and fit.

Pleadings: The plaintiff's reply and defence to the counterclaim

The plaintiff joined issue with the defendant on its defence. With respect to paras 2 and 3 of the defence, the plaintiff contended that it did exercise all reasonable care and skill in the conduct of its obligations under the advisory agreement, and maintained that:

(i) The plaintiff was appointed as advisor to the defendant for the purposes of an unconditional mandatory general offer ('general offer') to acquire the UCB share on or about 21 July 1997.

(ii) Upon their appointment, the plaintiff indicated to the defendant that based on their knowledge of the prevailing policies, various approvals would be required for the general offer, namely that of the Securities Commission, Foreign Investment Committee ('FIC') and possibly that of the Ministry of Finance ('MOF').

(iii) Subsequently, this was confirmed at a meeting with the Securities Commission officials on 11 August 1997 where both the plaintiff's representatives and the defendant and his representatives were present. At the meeting, the Securities Commission specifically informed the parties that approval from, inter alia, MOF was required before the Securities Commission would allow the issue and dispatch of the offer document.

(iv) On 12 August 1998, the plaintiff sent a letter to the defendant's solicitors, Messrs SK Tay & Co informing them of the Securities Commission's stand on the matter and advising them to proceed with the application to, inter alia, the MOF without delay as the Securities Commission approval would only be forthcoming upon obtaining MOF approval.

(v) The plaintiff's representatives then attended a meeting with MOF on the 15 August 1997 where MOF confirmed that its approval was required before the take over (as defined in the statement of claim) could proceed.

(vi) On 18 August 1998, the plaintiff sent a facsimile to Messrs SK Tay & Co enclosing the relevant pages of the draft submission to the MOF for the defendant's approval. In that letter, the plaintiff informed the defendant's solicitors that the rest of the information for the submission to the MOF would be essentially the same as that in the application to the Foreign Investment Committee, which had already been submitted.

(vii) On 21 August 1997, the plaintiff sent a facsimile to Messrs SK Tay & Co reminding them that the plaintiff was awaiting their instructions for the submission to the MOF. SK Tay & Co were also notified that in the event the MOF approval was not obtained by 1 September 1997, they would have to obtain an extension of time from the Securities Commission for the dispatch of the offer document.

(ix) On 25 August 1997, SK Tay & Co Management Sdn Bhd provided the plaintiff with some additional information for the MOF application and the application to the MOF was submitted by the plaintiff on 26 August 1997.

(x) On the same day, the plaintiff applied to the Securities Commission for an extension of time to dispatch the offer document till after receipt of the FTC and MOF approvals.

(xi) On 29 August 1997, the Securities Commission approved the plaintiff's application for the extension of time.

(xii) Subsequently, by letters dated 27 and 30 October 1997 respectively, the plaintiff appealed to the Securities Commission to allow the issue and dispatch of the offer document before the MOF approval in the event the MOF approval was not obtained by the 4 November 1997. However, this appeal was refused by the Securities Commission by a letter dated 5 November 1997(incorrectly dated 5 October 1997).

(xiii) On 13 November 1997, the MOF approval was obtained. To the extent that paras 5 to 10 of the defence are inconsistent with the above, the same are denied.

The plaintiff contended that the defendant was aware at all material times that MOF approval was required for the take over, and is now attempting to escape his liability to pay the plaintiff for their services rendered pursuant to the advisory agreement by raising these frivolous allegations in his defence, that there was no delay on the part of the plaintiff in carrying out its obligations pursuant to the advisory agreement and that the offer document could not be dispatched prior to obtaining all relevant approvals, including that of the MOF, which was obtained on 13 November 1997.

With respect to the other defences, the plaintiff replied as follows:

(i) The plaintiff was appointed by the defendant as advisor for the general offer by an agreement dated 21 July 1997 ('the advisory agreement').

(ii) Pursuant to an underwriting agreement dated 25 July 1997 the plaintiff agreed to underwrite the entire amount of the offer shares totaling 21,447,597 shares at the price of RM5.02 per share.

(iii) Pursuant to this, the plaintiff entered into a put option agreement with MGI Securities Sdn Bhd, MBf Northern Securities Sdn Bhd and Alor Setar Securities Sdn Bhd on 25 July 1997 to sub-underwrite the offer shares.

(iv) The put option did not in any way detract from the plaintiff's obligations to the defendant to underwrite the offer shares pursuant to the underwriting agreement dated 25 July 1997, nor did it render the underwriting agreement void.

(v) The underwriting agreement was a valid and binding document between the plaintiff and the defendant and the plaintiff fulfilled its obligations under the same by remitting the sums of RM98,464,709.36 from its funds to the account of Daftarcorp Sdn Bhd ('Daftarcorp') on 26 December 1997, in compliance with its obligation to underwrite the offer shares. Daftarcorp were UCB's Share Registrars at the relevant time. The total sum underwritten by the plaintiff was RM107,665,727.12. However, the sum of RM9,201,017.76, difference between the underwritten sum of RM107,665,727.12 and the sum of RM98,464,709.36 remitted by the plaintiff was remitted directly by Alor Setar Securities Sdn Bhd, and Omega Securities Sdn Bhd on behalf of Alor Setar Securities Sdn Bhd, into Daftarcorp's account, pursuant to its obligation to the plaintiff under the put option agreement.

(vi) That the put option agreement entered into by it was for the purpose of spreading its risk and liquidation of its position which is common business practice in underwriting transactions. To the extent that paras 11 to 19 of the defence are inconsistent with the foregoing, they are denied.

As defence to the counterclaim, the plaintiff repeated the above and averred that the defendant's counterclaim has no basis and save as expressly admitted, the plaintiff denied each and every allegation in the statement of defence.

Order 14 applications

In an O 14 application, the court has to consider whether there are triable issues. If there are triable issues, then the application would be refused. In other words the defendant need only to show that there is a triable issue or that there ought for some other reasons to be a trial of the action. In *Ng Ah Ba & Ors v Ramanda Sdn Bhd* [1996] 1 MLJ 62 (CA), Shaik Daud JCA explained that (at p 69):

> Under an O 14 application, the duty of the judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. ... unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application.

Thus, as in *Faber Merlin (M) Sdn Bhd v Lye Thai Sang* [1985] 2 MLJ 380, a case on undisputed facts and as a matter of the proper construction of the agreement and the application of the proper law, is an eminently fit one for proceedings under O 14. In *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 (SC) at p 185 Hashim Yeop Sani SCJ (as he then was) said:

> The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

In *Kapital Raya Sdn Bhd v Bloomville Corp Sdn Bhd* [1996] 3 MLJ 522 (CA) it was held, following *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (SC) that in an O 14 application, the court has to be satisfied on the affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable. The determination of whether or not an issue is triable depends on the facts arising from each case as disclosed in the affidavit evidence before the court. There must be sufficient facts disclosed on the affidavit evidence to show there is substance to the assertions, a final determination upon which is best made after discovery, interrogatories, and or examination of witnesses as the parties think fit, in a trial.

Thus, after first identifying the issues of fact or law, the court must go one step further and determine whether they are triable. A complete defence need not be shown. The defence set up need only show that there is a triable issue. It is trite that the term 'triable' is used in the sense of requiring to be tried so as to determine a fact in issue, and not in the colloquial usage of

merely 'can be tried'. If the latter sense is adopted, every argument however absurd or unlikely to succeed could be used to insist upon a trial. A triable issue is an assertion that not only has been raised and is denied or disputed, but is one upon which there is some evidence that is not equivocal or lacking in precision, or is not inconsistent with undisputed contemporary documents or other statements by the same deponent, or is not inherently improbable in itself, to support it.

Where the facts are clear and undisputed, there is no purpose in a trial. In such a case the court should exercise its power of summary judgment under O 14 because then the issue remaining is then only a question of inferences to be drawn from those facts and/or question of law, which requires submission but not the calling of witnesses. Also, if the point of law is identified and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because the question of law at first appears to be of some complexity and therefore took a little longer to understand': *Cow v Casey* [1949] 1 All ER 197; *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508.

In determining if issues sought to be raised are triable issues, it is important to appreciate that O 14 applications are dealt with only on affidavit evidence. In *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin Ors* [1995] 2 MLJ 213 (CA) Gopal Sri Ram JCA held:

> Whenever a court is required to judicially appreciate affidavit evidence, it is a necessary adjunct of that function for the court to ascertain whether the allegations made are inherently improbable or inherently incredible or patently inconsistent with contemporaneous documents. Whether such an analysis ought to be undertaken, depends upon the jurisdiction the court is exercising and, more importantly, upon the particular facts of a case.

Nevertheless I am also mindful of the decision in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (PC) where it was held as to affidavit evidence (at p 217):

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he 'may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

The majority of the Supreme Court held in *Bank Negara Malaysia v Mohd Ismail*, that the principle in *Eng Mee Yong & Ors v V Letchumanan* is applicable to all cases involving affidavit evidence. The affidavits must show that the assertions made has some basis, be it in documents produced, or by names of persons who would testify to such facts as would support the assertions.

The issues

The first issue is that the plaintiff failed to exercise reasonable care and skill in providing the professional services, and failed to properly advise the defendant and/or make sufficient representations to the Securities Commission with regards to the decision of the Securities Commission requiring the defendant to obtain approvals from the Ministry of Finance for the purposes of the general offer.

The particulars advanced are:

(a) Failing to take any or any adequate or effective measures to make representations to the Securities Commission that the approval of the Ministry of Finance was not required for the general offer, at the request of the defendant;

(b) Failing to take any or any adequate or effective steps to apply for a review of the decision of the Securities Commission that approval of the Ministry of Finance was required for the general offer; and

(c) Failing to advise or properly advise the defendant that representations could be made and a review could be sought with regards to the decision.

The assertion the plaintiff failed to take any or any adequate or effective measures to make representations to the Securities Commission that the approval of the Ministry of Finance was not required for the general offer, is purely argument and opinion. The defendant did not indicate how he would prove the assertion. It was not disputed that the Ministry of Finance did give its approval. No such approval would have been issued if its approval was not required in the first place. It is clear then the approval of the Ministry was required. The first assertion is therefore clearly unsupportable.

The second assertion that the plaintiff failed to take any or any adequate or effective steps to apply for a review of the decision of the Securities Commission that approval of the Ministry of Finance was required for the General Offer. It was not shown that such an application was going to be decided upon any quicker than an application for approval by the Ministry of Finance or indeed if such an application is likely to be given. If not, it would have added more delay. The defendant had left these questions at large. I should not and cannot speculate, on the basis of the affidavits produced, how a trial might serve to resolve it.

Similarly the assertion by the defendant that the plaintiff failed to advise or properly advise the defendant that representations could be made and a review could be sought with regards to the decision. While this assertion was made, nothing was shown to the court that there may be some basis for the assertion, such as some document, or names of persons in a position of authority from the stock exchange or other merchant banks, who are prepared to give evidence that such representations would be more likely to be considered favourably than an application to the Ministry of Finance, and more importantly, would be dealt with more speedily, and therefore

ought to have been made in this case. On the other hand Wan Hashimah binti Ahmad Merican, the general manager of the Corporate Finance Division of the plaintiff bank had asserted in her affidavit of 9 July 1998 that on 15 August 1998 in a meeting between her and Allen Cheong for the plaintiff and Abdul Aziz Awang and Mohd Ismail for the Ministry of Finance, it was confirmed by the Ministry that their approval was required, and that the Ministry maintained this position. There was nothing to say that this was untrue. The fact the Ministry did issue an approval supports the view that her assertion is truthful. Furthermore, the plaintiff had sought to minimise the effect of any delay by seeking consent of the Securities Commission to issue the general offer documents before receipt of the approval of the Ministry of Finance, which application was rejected by the Securities Commission. It is clear that the Securities Commission was adamant on the approval of the Ministry of Finance being received before it would allow the defendant to proceed with the general offer.

To summarise, nothing is produced as would suggest that a review so as not to require the Ministry's approval, would be likely to be considered favourably and could be obtained, together with the approval of the Securities Commission for the takeover, earlier than obtaining the approval of the Ministry of Finance, so as to warrant a trial of this question.

Central to the defendant's argument is that there was an express undertaking that the takeover exercise would be completed within 56 days. This alleged express undertaking was not pleaded in the pleadings but was raised only in the defendant's affidavit. The argument not having been pleaded, and there being no application to amend the pleadings, the argument that there was an express undertaking that the takeover exercise must be completed within 56 days must be disregarded: see *United Malayan Banking Corp v Palm & Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206; *United Malayan Banking Corp v Datin Theresah bte Abdullah* [1995] 1 AMR 304. In any case, under r 34.1(a) of the Malaysian Code on Take-overs and Mergers 1987, the defendant had no choice but to make the general offer in any event. It was not pleaded that the defendant would have appointed any other merchant bank to advise upon the making of an general offer if it were not for such express undertaking by the plaintiff. Nor, in raising this argument, did the defendant point to or produce any correspondence or occasion when this grievance was raised with the plaintiff. The assertion and argument being raised at a late stage I would conclude that it is an afterthought and merits no trial.

The second issue is that the underwriting agreement is a sham document which was not intended by the plaintiff or the defendant to create legal rights and obligations.

On the face of it the underwriting agreement is properly executed. The defendant admitted signing it. Nothing in the document shows that is not intended to be a legally binding agreement. The law recognises and gives effect to collateral agreements which changes the terms of an agreement: see *Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd* [1992] 2 MLJ 137. The defendant however has not pleaded that there is a collateral agreement

existing alongside the underwriting agreement, such that the plaintiff cannot rely on the provisions of the underwriting agreement alone. Instead the defendant has pleaded that the underwriting agreement is a sham.

The execution of an underwriting agreement is not inconsistent with the advisory agreement. The defendant admitted that pursuant to the obligation to provide financial resources to the defendant, the plaintiff was to underwrite the entire amount of the UCB shares which were the subject of the offer. The document would, in the ordinary course, be produced to the stock exchange and to investors and shareholders. The plaintiff, a licensed merchant bank, has denied that the agreement was a sham. As a licensed merchant bank it would have much more to lose that the immediate transaction with the defendant if it were caught participating in a sham as alleged. It would also not be in its interests to enter into the agreement if it did not intend to receive the fees as stated as such payments are taxable. If it is also borne in mind that merchant banks ordinarily earns income from charging fees for advisory and underwriting services, the plaintiff's assertion that fees were intended to be paid is consistent with the common course of its business. Indeed if the underwriting agreement is a sham and not intended to have a legal effect, then there would be no reason to incorporate the fee of 1%, as it would attract tax. It would have been more consistent with the intention of no legal effect at least to lower the fee substantially and minimise the cost to the plaintiff. I conclude that it is inherently incredible that the plaintiff would participate in a sham agreement, the sole purpose of which is to mislead, misrepresent and defraud the stock exchange and investors for the sole benefit of the defendant.

The defendant while asserting that the underwriting agreement was a sham failed to advance or point to any source of evidence to support its assertion that the agreement was a sham. Indeed no collateral arrangements was pleaded in the defence and counterclaim as would explain why the plaintiff would enter into a sham agreement. Upon the failure to plead it, the argument ought to be disregarded. Upon the failure of the defendant to point to any evidence or source of evidence of any such collateral agreement, no triable issue of a collateral contract can arise as would affect the underwriting agreement.

The defendant has admitted that he had signed the underwriting agreement. There being no assertion it was signed under any form of duress or other circumstances as to negate voluntariness in entering into the agreement, or that he was in any way incompetent to sign the agreement, it is a voluntary and valid agreement. Without a collateral agreement, an underwriting agreement not intended to have legal effect would purely be a sham. If the defendant had signed the agreement with the intention that it be a sham, he cannot rely upon that unlawful and dishonest act for his benefit. Indeed it is wholly contrary to public policy and public interest to accept that a duly executed agreement could be set aside by a party as a sham and upon the unilateral assertion that he intended it to be a sham.

Considering the foregoing, the absence of any evidence that the inherently incredible assertions could be supported by evidence of documents or testimony of persons named by the defendant who could give evidence in support of such assertions, leads me to conclude these assertions sought to be raised as issues are not triable, and no real purpose would be achieved by holding a trial.

The third issue is that by reason of the execution of the put option agreement, there is no valid or no consideration between the plaintiff and the defendant with regard to the underwriting agreement.

The plaintiff had claimed that fees of RM1,076,657.27 became due and payable under the underwriting agreement on 2 January 1998. The defendant's version is that the plaintiff had asked the defendant in or about July 1997 to procure put options and that the defendant did so from three brokers in the put option agreement dated 25 July 1997. Under the put option agreement there was an obligation by the brokers to purchase the offer shares upon the exercise of the put option by the plaintiff. The defendant ingeniously argued this made the obligation by the plaintiff to underwrite illusory since it was the brokers who had the obligation to take up the shares, and furthermore there was no longer valid consideration between the plaintiff and the defendant.

The plaintiff's reply as set out earlier above is wholly consistent with underwriting agreements generally. Underwriters, whilst they undertake to purchase all of the shares as in this case, do not expect to have to end up purchasing the shares themselves. They expect the shares would be taken up by others, but if those others fail for any reason to take up the shares, the underwriter undertakes to take up the shares. The purpose of having an underwriter is to give assurance that there are sufficient funds to pay for the shares. An underwriter may choose to reduce his own exposure to that risk by entering into agreements such as put options with brokers to take up those shares, but in the event the brokers fail to take up the shares, the underwriter still has the obligation to take up those shares. It is pertinent that the put option was entered into between the brokers and the plaintiff, and not with the defendant.

It was asserted by the defendant that the plaintiff through its officers, servants and/or agents requested the defendant to obtain the brokers for the put option. The assertion refers to the person or persons making the request in general terms. No evidence in the form of any document or names of persons who can give testimony is given or suggested. As such it remains a bare assertion. There is nothing in the defendant's affidavits to show that this issue may be resolved by a trial. The defendant's case on this point is therefore simply argument and requires no trial as it is simply rests upon interpretation.

The plaintiff's answer, on the other hand, is consistent with the common course of business, and the defendant has given no evidence to give reason to doubt it. The only conclusion is that there is no substance to the defendant's argument.

The plaintiff had otherwise performed all of its advisory and underwriting obligations. The arguments of the underwriting agreement lacking consideration and not intended to be binding, and of the advisory services not being performed with the requisite care and skill being plainly unsustainable, the appeal was allowed with costs and judgment was entered in terms of the O 14 application, prayers 1(i) and (ii) and 2 in encl 6; and the parties were directed to make additional submissions upon the issue raised as to whether the plaintiff ought to have disclosed to the Securities Commission the put-options, and if so what are the consequences of failure to do so.

Section 10.10 of the policies and guidelines on issue/offer of securities issued by the Securities Commission provide that:

> ... There should be disclosed the names of the managing underwriter and co-underwriters, and the amount agreed to be underwritten by each of the underwriters together with the commission charged. In addition, the corporate adviser making the application should be part of the syndicate of underwriters and be prepared to be the sole underwriter in the event that the other co-underwriters are not able to underwrite ... .

There are no other legal provisions with regard to disclosure. The defendant's argument is that in failing to disclose the put options which in fact are sub-underwriting agreements, the plaintiff made false or misleading statements contrary to s 86 of the Securities Industry Act (Act 280) and s 32B of the Securities Commission Act (Act 498).

Section 10.10 is clear that the plaintiff as corporate adviser, should be prepared to be the sole underwriter in the even co-underwriters fail to underwrite. The failure to disclose a co-underwriter is therefore not serious, since even if it is disclosed, the co-underwriter is not obligated to underwrite, and the burden remains with the corporate adviser. It is obvious any misrepresentation or misleading that occurs in announcing a co-underwriter and eventually not having that co-underwriter meeting his obligations is not a serious misrepresentation. There is no requirement that sub-underwriters or put options be disclosed. Given the penal consequences of offending against s 86 of the Securities Industry Act (Act 280) and s 32B of the Securities Commission Act (Act 498), the disclosure provision must be read strictly. A co-underwriter is in any case quite different from a sub-underwriter who enters the picture after and not together with the principal underwriter. Since a sub-underwriter underwrites from his principal underwriter, the principal underwriter remains legally the sole underwriter. Having underwritten the securities, it does not matter if it should subsequently be sold, be it by way of the device of sub-underwriting, put option or sale.

The arrangement adopted by the plaintiff in this case is a put option, under cl 15 of which the plaintiff by way of notice exercising the option, may require the brokers to purchase the securities. It is an entirely a separate arrangement and although it may have an effect similar to that of a sub-underwriting arrangement, is quite distinct therefrom. It is a transaction entirely between the plaintiff and the brokers, and outside of an

underwriting arrangement. Whilst in a sub-underwriting arrangement the sub-underwriter underwrites from and after the principal has performed his obligation to underwrite, the plaintiff may require the brokers to purchase the securities even though they are not in the name of the plaintiff so long as the plaintiff has the power of disposal over the said securities. At all times the plaintiff is the sole underwriter.

I would in the circumstances rule that the put option is not required to be disclosed to the Securities Commission. Prayers 1(iii) and (iv) as contained in encl 6 is hereby allowed and prayers 1(i) and (ii) and 2 in encl 6 previously granted are confirmed.

Order accordingly.

Reported by Jafisah Jaafar